Supreme Court, U.S.
FILED
951949 APR 2 1996
OFFICE OF THE CLERK

DOCKET NO: _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DEBRA LOUISE NEUMAN,

Petitioner,

vs.

TIMOTHY ALAN BENNETT,

Respondent.

Petition for Writ of Certiorari
To the Fifth District Court of Appeals
of the State of Florida

PETITION FOR WRIT OF CERTIORARI

RICHARD J. D'AMICO, ESQUIRE
Attorney for Petitioner
154 South Halifax Avenue
Daytona Beach, Florida 32118
904-255-0932
Florida Bar No. 360317

6700

QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Parental Kidnapping Protection Act (PKPA), 28 USC 1738(A), the State of Florida retains jurisdiction over a proceeding for the modification of the child custody provisions of a Final Judgment of Dissolution of Marriage, when the Florida court has reserved jurisdiction over the parties and Petitioner has maintained continuous residence in the State of Florida since the Final Judgment of Dissolution of Marriage was entered.

2. Whether the dictates of the PKPA control over conflicting provisions of the Uniform Child Custody Jurisdiction Act (UCCJA).

STATEMENT PURSUANT TO RULES 14.1(b)

All parties are named in the caption.

Petitioner is the former wife in the Florida proceeding and Respondent is the former husband in the Florida proceeding.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 14.1(b) ii

INTRODUCTORY PRAYER 1

REFERENCE TO REPORTS OF OPINION 2

GROUNDS UPON WHICH JURISDICTION IS INVOKED 2

STATUTE RELIED UPON BY APPELLANT 2

STATEMENT OF THE CASE AND FACTS 5

MANNER OF RAISING FEDERAL QUESTIONS 9

ARGUMENT IN SUPPORT OF THE WRIT 9

CONCLUSION 14

TABLE OF AUTHORITIES

664 So. 2d 261 (1995) 2

Braxton v. U.S., 500 U.S. 344, 114 L. Ed.2d 385,
111 S.Ct. 1854 (1991) 2

28 USC 1738(A) 2,9,10,14

Thompson v. Thompson, 484 U.S. 174, 98 L.Ed. 512,
108 S.Ct. 513 (1987) 9

Yurgel v. Yurgel, 572 So. 2d 1327 (Fla. 1990.) 11

Enslein v. Enslein,
112 A.D. 2d 973, 492 N.Y.S. 12 2d 785 (1985) 11

Adoption of Zachariah K.
8 Cal. Rptr. 2d 423 (Ca. 1992.) 11

Wilson v Gouse, 441 S. E. 2d 57, (Ga. 1994) 13

Zook v. Davis, 641 A. 2d 849 (Del. Fam. Ct. 1992) 13

Wilcox v. Wilcox, 862 S.W. 2d 533 (Tenn. att. 1993). 13

Malik v. Malik, 638 A. 2d 1184 (Md. App. 1994) 13

Matter of Adoption of Child by T.C.,
636 A. 2d 1083 14(N. J. Super, A.D. 1994) 13

Mark L. v. Jennifer S, 506 N.Y.S. 2d 1020 (1986) 14

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. _____

DEBRA LOUISE NEUMAN,

Petitioner,

vs.

TIMOTHY ALAN BENNETT,

Respondent.

Petition for Writ of Certiorari
To the Fifth District Court of Appeals
of the State of Florida

PETITION FOR WRIT OF CERTIORARI

---

1. INTRODUCTORY PRAYER

Petitioner, Debra Louise Neuman, prays this court to grant her petition for certiorari to review an adverse decision by the Fifth District Court of Appeals of the State of Florida and shows to the court the following:

2. REFERENCE TO REPORTS OF OPINIONS

The opinion of the Fifth District Court of Appeals is reported at 664 So. 2d 261 (1995).

3. GROUNDS UPON WHICH JURISDICTION IS INVOKED

The jurisdiction of this court is invoked by reason of a final decree issued by the Fifth District Court of Appeals of the State of Florida on November 28, 1995. Petition for review to Supreme Court of Florida was dismissed on January 5, 1996. No orders for rehearing or orders granting extensions of time within which to Petition for Certiorari have been requested or granted. The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is Supreme Court Rule 10.1(c), Braxton v. U.S., 500 U.S. 344, 114 L. Ed.2d 385, 111 S.Ct. 1854 (1991).

4. STATUTE RELIED UPON BY APPELLANT

The primary statute relied upon by Appellant is 28 USC 1738(A) which reads as follows:

Section 1738A. Full faith and credit given to child custody determinations.

> (a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.
>
> (b) As used in this section, the term
>
> (1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "Home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States. the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if -

(1) such court has jurisdiction under the law of such State and

(2) one of the following conditions is met;

(A) such State (i) the home State of child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and

(II) there is available in such State substantial evidence concerning the

child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent

whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if -

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) a court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination .

5. STATEMENT OF THE CASE AND FACTS

The marriage between the parties was dissolved by Judgment of the Circuit Court, Duval County, on October 14, 1985.

Pursuant to that Judgment, the parties were awarded shared parental responsibility to the child of the marriage, SARAH ANNE BENNETT, with Former Husband designated as the primary residential parent. However, the child had been and continued to reside with Petitioner. Thereafter, the parties entered into a Stipulation of Settlement modifying the primary residential parent from that of Former Husband to that of Petitioner. This stipulation was executed by Former Husband on January 21, 1987 and was filed in the Circuit Court, Duval County, on February 9, 1987. Petitioner has been a continuous

resident of the State of Florida since the divorce was granted.

After the modification stipulation was filed in Duval County, Former Husband engaged in acts of domestic violence, stalking, and verbal and psychological abuse of Petitioner. In order to protect the child, in November of 1989 Appellant sent the child to live temporarily with Appellant's sister in Ohio. In and about January of 1990, Former Husband learned of the fact that the child was residing with the Appellant's sister in Ohio and commenced a proceeding in the State of Ohio to establish physical custody to the child. He appeared at a hearing in Warren County, Ohio, stating that he was the custodial parent of the child and entitled to immediate custody of the child. The petitioner was not notified of the hearing. During the course of that proceeding, he neglected to inform the Court of the fact the parties had previously entered into a Modification Agreement in Florida and that the child had been in the custody of Petitioner since the Modification Agreement had been signed. On the basis of the statements made by Former Husband and the omissions of Former Husband, the Ohio Court granted custody to Former Husband.

After the hearing in Ohio, Former Husband immediately removed the child from the State of Ohio and transported her to his residence in Elmira, New York. Former Husband then applied to the Court in the State of New York and obtained a temporary custody order which was served upon Petitioner in the State of Florida shortly before the scheduled hearing in the State of New York. Petitioner was unable to attend the hearing upon such short notice. The child has remained in the custody of Former Husband since January of 1990.

In 1993, Former Husband commenced an action in the State of New York to have the child adopted by his present wife, an action which, if successful, would result in a termination of Petitioner's parental rights. Petitioner filed a counter petition

to enforce her Florida custody order and also objected to the subject matter jurisdiction of the Court. After a trial, the Family Court of the State of New York entered an Order granting Former Husband custody of the child subject to limited visitation rights with Petitioner. Petitioner's first visitation in Florida with the child took place in August of 1994.

During the August 1994 visit, Petitioner observed that the child was suffering from substantial physical, educational, and psychological difficulties. She alleged the following in her Petition:

a. The child appeared much smaller than she should have been at her age and appeared unhealthy and malnourished.

b. The child's educational level was such that she was at the second grade level while actually in the fourth grade.

c. She had been subjected to psychological abuse by her father who attempted to alienate the child from her mother.

d. The child was very fearful of her father stating that she had been beaten by her father and was afraid to return to New York.

In August of 1994, Appellant commenced a Modification proceeding in the Circuit Court, Flagler County, her present County of residence. Former Husband moved to dismiss the Petition. At the hearing held before the Circuit Judge, no evidence was taken. Rather, the Court heard oral argument of the attorneys and reviewed the Order entered in the State of New York. After that hearing, the Court granted the motion to dismiss. The Fifth District Court of Appeals affirmed without opinion. The Supreme Court of Florida dismissed a Petition to

Review on January 5, 1996. This Petition for Writ of Certiorari was then initiated.

6. MANNER OF RAISING FEDERAL QUESTIONS

The Federal questions under USC 1738(A) were raised before the Fifth District Court of Appeals in the State of Florida. The method of raising the federal question was in Appellant's initial and reply brief to the court (Appendix A-44, first page of reply brief). The court affirmed the order of the lower tribunal without opinion.

7. ARGUMENT IN SUPPORT OF THE WRIT

In Thompson v. Thompson, 484 U.S. 174, 98 L.Ed. 512, 108 S.Ct. 513 (1987) the court stated that it would resolve any disputes arising under the PKPA, 28 USC, Section 1738(A). While theThompson case involved the question of whether the PKPA authorizes federal court jurisdiction in child custody matters, dicta of the court expressly states that the Supreme Court would accept jurisdiction to resolve any questions regarding that statute. On page 187 the court stated:

> "We note, as a preliminary response, that ultimate review remains available in this Court for truly intractable jurisdictional deadlocks."

This case presents such an intractable deadlock as jurisdiction expressly granted by the PKPA has been ignored by a State Court.

Petitioner in this case, DEBRA LOUISE NEUMAN, is a resident of the State of Florida and has been a continuous resident of the State of Florida since her dissolution of marriage was granted by a Florida court. The judgment of the Florida court expressly reserved jurisdiction to modify or amend the child custody provisions of the judgment. In August of 1994,

Petitioner commenced a modification proceeding seeking to modify custody of her daughter in a Florida court. The Florida court declined jurisdiction and dismissed the Petition even though the Court had reserved jurisdiction in the Final Judgment. This decision was based on part upon the fact that the Former Husband and child resided in New York and that the Former Wife had defended litigation in New York

One of the major purposes of the PKPA was to designate a single state to have exclusive subject matter jurisdiction in a child custody modification proceeding. This is expressly set forth at 28 USC1738(A), section (d) which reads as follows:

> "(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Subdivision (c)(1) reads as follows:

> (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if
> (1) such court has jurisdiction under the law of such State."

Based upon these provisions of the PKPA, since Appellant was a continuous resident of the State of Florida and since Florida has jurisdiction by virtue of its reservation of jurisdiction in the final judgment, Florida never lost jurisdiction and thus, was legally barred from declining jurisdiction.

Florida courts have refused to recognize the fact that the PKPA preempts all state law even though case law in both

Florida and New York recognize that under the Supremacy clause, the PKPA controls over the UCCJA. Yurgel v. Yurgel, 572 So. 2d 1327 (Fla.1990.) Enslein v. Enslein, 112 A.D. 2d 973, 492 N.Y.S. 2d 785 (1985.) Ignoring the Supremacy clause, the state courts of Florida have refused to recognize the PKPA in this custody modification commenced by a Florida resident who has continuously resided in the State. The PKPA has been said to pre-empt state law with regard to the factors necessary before jurisdiction can be exercised in interstate custody matters. Enslein supra. Adoption of Zachariah K. 8 Cal. Rptr. 2d 423 (Ca. 1992.)

Pursuant to Supreme Court Rule 17.1(c), when a State court has decided an important question of federal law which has not been, but should be settled by the court, the court should grant certiorari. Questions regarding child custody and interstate jurisdiction in child custody disputes have long been a source of tremendous difficulty in the State courts. The Uniform Child Custody Jurisdiction Act has been enacted by virtually all of the states in an attempt to eliminate parental kidnapping and forum shopping. The PKPA was subsequently enacted by Congress to resolve any conflicts with the UCCJA, to prevent kidnapping for the purpose of acquiring jurisdiction, and to create the most consistent manner of determining the proper state which should have jurisdiction in an interstate custody dispute. With divorce and child custody litigation rampant, consistency in determining jurisdiction is a matter of extreme importance nationwide. The Congress found specifically as follows in the Historical and Statutory notes to Section 1738(A), 28USCA 1738(A) as follows:

> "(a) The Congress finds that
>
> (1) There is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children

under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;...

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, and deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians."

Based upon the facts of this case, the State of Florida has complete and uncontestable jurisdiction under the PKPA. The State courts, however have refused to recognize the PKPA as supreme authority and instead rely upon the provisions of the UCCJA and existing case law.

Conflicts presently exist among the various jurisdictions regarding the continuing residence requirement of subsection (d) and the so-called "significant connections doctrine." While the clear intent of the statute appears to be that if one contestant still remains in the state a modification must be brought in that

state, some courts have ignored that requirement and have imposed their own significant connection theory. See Wilson v. Gouse, 441 S. E. 2d 57, (Ga. 1994) Zook v. Davis, 641 A. 2d 849 (Del. Fam. Ct. 1992). Other jurisdictions, however, have upheld the PKPA. See Wilcox v. Wilcox, 862 S.W. 2d 533 (Tenn. att. 1993). Still other jurisdictions have determined that more than one home state may exist, Malik v. Malik, 638 A. 2d 1184 (Md. App. 1994), while other jurisdictions have denied that significant connections must be weighed against each other to entrust a single State with jurisdiction, Matter of Adoption of Child by T. C., 636 A. 2d 1083 (N. J. Super, A.D. 1994). Analysis of case law from many of the states indicates a tremendous confusion over the exact dictates of the PKPA in determining jurisdiction over a modification proceeding.

While the purpose of the PKPA was to resolve any conflicts inherent in the UCCJA, the result has been the exact opposite. Since the enactment of the PKPA, numerous cases have been appealed to the various state appellate courts and supreme courts. Contrary and inconsistent results have occurred in cases having substantially similar fact patterns depending on the State involved. The difficulties that have been encountered in the administration of the PKPA and UCCJA are illustrated by the fact that in excess of ten lengthy American Law Reports articles have been written concerning the jurisdictional issues surrounding the PKPA and UCCJA. The following are the most recent:

> 21 ALR5th 396; 20 ALR5th 700; 16 ALR5th 650; 6 ALR5th 1; 6 ALR5th 69; 5 ALR5th 550; 5 ALR5th 788; 83 ALR4th 742; 78 ALR4th 1028; 80 L Ed 2d 886.

This plethora of commentaries is indicative of the major, substantial conflicts and problems concerning custody juris-

diction. Stringent guidelines and judicial intervention are necessary to avoid constant and repetitive jurisdiction litigation.

As many of the jurisdictional disputes concerned modification of existing decrees, the issue that Petitioner requests this Court to decide could well affect hundreds of thousands of cases and save families in custody disputes substantial legal fees. Rather than pay legal fees, family funds should be used for the support and maintenance of the children.

The Congressional intent of the PKPA is to have the court of original jurisdiction retain jurisdiction. The congressional intent of the PKPA has been to channel custody litigation to the court that has continuing jurisdiction. Mark L. v. Jennifer S., 506 N.Y.S. 2d 1020 (1986.) Again, the Florida courts have ignored this strong congressional intent and have declined jurisdiction over this matter without cause or justification and in violation of the PKPA.

CONCLUSION

A review of case law since the enactment of the PKPA reveals numerous decisions of State courts with diametrically opposite results in similar cases involving child custody jurisdiction. The purpose of the act was to eliminate many of these problems and apply a consistent rule for the determination of jurisdiction. In the instant case, the State of Florida failed to apply the strict provisions of 28 USC 1738(A)(d) in that it refused to accept jurisdiction of a case when one contestant remained a resident of the State of Florida. The large number of current domestic relations actions and custody disputes in the United States requires that the guidelines enacted by Congress be followed strictly. The only way state Courts will ever recognize the supremacy of the PKPA and follow the PKPA is a pronouncement from the Supreme Court.

/S/_____

RICHARD J. D'AMICO, ESQUIRE
Attorney for Petitioner
154 South Halifax Avenue
Daytona Beach, Florida 32118
904-255-0932

Florida Bar No. 360317

CONTENTS TO APPENDIX

1. Opinion Supreme Court of Florida A-1

2. Opinion Fifth District Court of Appeals A-2,A-3

3. Order of the Circuit Court, Flagler County, Florida A-4,A-5

4. Modification filed in the Circuit Court, Duval County ..... A-6—A-9

5. Final Judgment of Dissolution of Marriage, Duval County, Florida ..... A-10—A-13

6. Order of Family Court State of New York .. A-14—A-19

7. Initial Brief - Fifth District Court of Appeals ..... A-20—A-40

8. Reply Brief - Fifth District Court of Appeals ..... A-41—A-46

SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 5, 1996

DEBRA LOUISE NEUMAN,
Petitioner, CASE NO. 87,097

vs.

TIMOTHY ALAN BENNETT,
Respondent. District Court of Appeals
5th District - No. 94-2411

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
cc:
Clerk
TEST:

Judge

H
Hon. Frank J. Habershaw,

Hon. Syd Crosby, Clerk
Hon. Kim C. Hammond,

Mr. Richard J. D'Amico
Mr. Bruce Alan Barnard

Sid J. White
Clerk Supreme Court

by:
/s/_____
Deputy Clerk

Supreme Court Seal

IN THE DISTRICT COURT OF APPEALS
OF THE STATE OF FLORIDA

FIFTH DISTRICT

JULY TERM 1995

DEBRA LOUISE NEUMAN,
Appellant,
v.
TIMOTHY ALAN BENNETT,
Appellee.
_____/

Not final until the time expires to file rehearing motion, and if filed, disposed of. CASE NO. 94-2411

Decision filed November 28, 1995

Appeals from the Circuit Court
for Flagler County,
Kim C. Hammond, Judge.

Richard J. D'Amico, Ormond Beach,
for Appellant.

Bruce-Alan Barnard, of Upchurch &
Parsons, P.A., St. Augustine, for Appellee.

PER CURIAM.

AFFIRMED.

I hereby certify that the above and foregoing
is a true copy of instrument filed

Frank J. Habershaw, Clerk
District Court of Appeals of
Florida, Fifth District
Per /s/
Deputy Clerk

HARRIS, GRIFFIN and ANTOON. JJ., concur.

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR
FLAGLER COUNTY, FLORIDA

CASE NO: 94-527 CA
DIVISION: 50

IN RE: THE MARRIAGE OF
DEBRA LOUISE NEUMAN,
Former Wife,

vs.
TIMOTHY ALAN BENNETT,
Former Husband.
_____/

ORDER

This cause came to be heard this 14th day of September, 1994, upon the Motion of Former Husband, TIMOTHY ALAN BENNETT, to Dismiss the pleadings of the Former Wife in the above-entitled action for lack of jurisdiction, and the Court having heard arguments of counsel and being otherwise advised of the premises, it is

ORDERED AND ADJUDGED:

1. This Court does not have subject matter jurisdiction to rule on the pleadings submitted to this Court by the Former Wife in the above-entitled action.

2. This Court yields to the October 8, 1993 Order issued by the Family Court of the State of New York: Chemung County.

3. The Former Husband's Motion to Dismiss is hereby GRANTED.

4. The minor child is to be returned to the Former Husband without delay.

DONE AND ORDERED in chambers at Bunnell, Flagler County, Florida this 19th day of September, 1994.

/s/
KIM C. HAMMOND
Circuit Court Judge

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.85-10920CA
DIVISION C

F I L E D
FEB 9 1987
/s/
S. Morgan Slaughter
Clerk - Circuit Court

IN RE: THE MARRIAGE OF:
DEBRA LOUISE NEWMAN, Wife
and
TIMOTHY ALAN BENNETT, Husband

MODIFICATION OF FINAL JUDGMENT

COMES NOW the former Wife, DEBRA LOUISE NEUMAN, and the former Husband, TIMOTHY ALAN BENNETT, and after consulting with each other, regarding the best interests of their minor daughter, SARAH ANNE BENNETT, hereby agree to modify the Final Judgment of Dissolution of Marriage, entered by this Honorable Court on October 11, 1985 as it pertains to the minor child of the parties, SARAH ANNE BENNETT, born September 20, 1985, as follows:

1. The parties agree to share their parental responsibility for raising their minor daughter, SARAH ANNE BENNETT, with the former Wife having the primary residential responsibility and with the former Husband having the right to visit and be visited by the child at all reasonable times and places. In order for the child to be assured of frequent and continuing contact with both parents, the parties agree to cooperate and confer concerning decisions relating to the major medical, education, religious training, and discipline of SARAH ANNE BENNETT.

2. The former Wife, DEBRA LOUISE NEUMAN, agrees to provide major medical insurance coverage on behalf of SARAH ANNE BENNETT, and the former Husband, TIMOTHY ALAN BENNETT, agrees to pay the former Wife for the cost of child care of SARAH ANNE BENNETT, said payment to be made directly to the former Wife. The parties agree to equally divide all other costs of providing food and clothing for their daughter.

3. This Court specifically reserves jurisdiction to modify or amend any of the matters set forth herein.

/s/	/s/
Debra Louise Neuman Dated 01-19-87	Timothy Alan Bennett Dated 01-19-87

STATE OF FLORIDA
COUNTY OF ST. JOHNS

BEFORE ME, this day personally appeared DEBRA LOUISE NEUMAN, the former Wife named in the foregoing Modification of Final Judgment, who after being duly sworn, deposes and says that she knows the contents thereof and the matters set forth are true and correct to the best of her knowledge and belief.

/s/
DEBRA LOUISE NEUMAN

SWORN TO AND SUBSCRIBED BEFORE me this 19th day of January, 1987.

/s/
Notary Public,
State of Florida at Large
My Commission Expires 7/19/89

STATE OF FLORIDA
COUNTY OF ST. JOHNS

BEFORE ME, this day personally appeared TIMOTHY ALAN BENNETT, the former Husband named in the foregoing Modification of Final Judgment, who after being duly sworn, deposes and says that he knows the contents thereof and the matters set forth are true and correct to the best of his knowledge and belief.

/s/
TIMOTHY ALAN BENNETT

SWORN TO AND SUBSCRIBED BEFORE Me this 21st day of January, 1987.

/s/
Notary Public,
State of Florida at Large
My Commission Expires 2/19/89

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED, Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida this 3rd day of Jan., A.D., 1990.

/s/
HENRY W. COOK
Clerk, Circuit and County Courts
Duval County, Florida

/s/
Valeria Young
Deputy Clerk

OFFICIAL RECORDS

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT
IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 85-10920-CA
DIVISION C

F I L E D
OCT 14 1985
/s/
S. Morgan Slaughter
Clerk - Circuit Court

IN RE: THE MARRIAGE OF
DEBRA LOUISE NEUMAN, Wife
and
TIMOTHY ALAN BENNETT, Husband

FINAL JUDGMENT OF MARRIAGE

This case was heard on the Petition for Dissolution of Marriage filed by the wife, Debra Louise Neuman. From the evidence presented the Court finds:

(a) The Court has jurisdiction of the parties and the subject matter of this action.

(b) The marriage of the parties Debra Louise Neuman, wife, and Timothy Alan Bennett, husband, is irretrievably broken,

(c) The parties are parents of a child born September 20, 1985, to-wit: Sarah Anne Bennett.

(d) The parties have entered into a stipulation concerning the custody and support.

Therefore, it is ORDERED AND ADJUDGED:

1. That the marriage of the parties Debra Louise Neuman and Timothy Alan Bennett is dissolved and each spouse is re-

stored back to the status of being single and unmarried.

2. That the husband shall have the primary physical residence and custody of the child subject to the wife to visit and be visited by the child at all reasonable times and places. In order for the child to be assured of frequent and continuing contact with both parents, the parents shall have shared parental responsibility of their child in those matters pertaining to major medical, education, religious training, and discipline of their child.

3. The husband shall have full financial responsibility of their child. The Court reserves jurisdiction to order support.

4. Except as to the dissolution of marriage granted in the final judgment, the Court specifically reserves jurisdiction to modify or amend any of the matters set forth herein.

DONE AND ORDERED THIS 14th DAY OF October, 1985. at Jacksonville, Duval, County, Florida.

/s/
T. FERNANDEZ
Circuit Judge

Copies:
Debra Louise Neuman
124 S. 12th Ave. Apt. 2
Jacksonville Beach, Florida 32250
and
Timothy Alan Bennett
124 S. 12th Ave. Apt. 3
Jacksonville Beach, Florida 32250

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED, Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida this 12th day of December, A.D., 1989.

/s/
HENRY W. COOK
Clerk, Circuit and County Courts
Duval County, Florida

By: /s/
Valeria Young
Deputy Clerk

FAMILY COURT OF THE
STATE OF NEW YORK:
CHEMUNG COUNTY

In the Matter of A Proceeding
Under Article 6 of
the Family Court Act

DOCKET NO. V-0705-90 & A-0801-93
PRESENT: Hon. Samuel J. Castellino
Judge.

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY, AFTER COURT HEARING, RESULT IN YOUR COMMITMENT TO JAIL FOR A TERM NOT TO EXCEED SIX MONTHS FOR CONTEMPT OF COURT.

DEBRA LOUISE NEUMAN,
Petitioner/Respondent,

vs .

TIMOTHY ALLEN BENNETT,
Respondent/Petitioner.

The Petitioner, Debra Neuman, seeks custody, or Sarah Bennett, D/O/B September 20, 1985, who is the natural daughter of petitioner and respondent, Timothy Bennett. Following a trial, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The parties were married in Florida on November 23, 1984, and separated June 11, 1985, and were divorced in October of 1985. The decree of divorce of the Circuit Court of Duval County, Florida, is dated October 14, 1985. The respondent was given physical custody of Sarah subject to petitioner's right of visitation, However, Sarah continued to reside with petitioner and two other daughters of petitioner, Amy and Rachell, having moved to St. Augustine from Jacksonville Beach, the respondent moved to St. Augustine about a year later.

The parties entered into a modification agreement, filed in the Circuit Court of Duval County on February 9, 1987, with petitioner having primary residential responsibility, and the respondent given reasonable visitation rights.

Petitioner testified to a series of events in Florida in which she claims respondent broke into her apartment, destroying personal property, and on one occasion held her captive with a bat. She testified that on a couple of occasions he ripped the telephone off the wall, and that she received threatening phone calls at work and at home. Respondent was hospitalized for depression and upon release moved next door to petitioner who claims the threats continued, causing her to change locks and nail the windows shut.

In May of 1989, she obtained an injunction against the respondent. Petitioner contends she was terrified of respondent, causing her to send her children to south Florida where her mother resided. At the end of August, 1989, the children were flown to Puerto Rico there they resided for several weeks until a hurricane required their removal . They went to live with petitioner's sister, Suzanne Hall in Ohio. Petitioner contends she kept in phone contact with the children during this time period.

In January of 1990, the respondent gained custody of the children through the Ohio Courts. The Order of the Common Pleas Court of Warren County Ohio gave custody of Sarah to respondent herein, apparently premised on the Florida order granting Bennett custody. The Ohio Court, was not made aware of the subsequent modification agreement filed in the Florida Court on February 9, 1987, giving custody of Sarah to her natural mother. Indeed, the Ohio Court found "--that there is no such other order existing---" (emphasis supplied). Respondent subsequently moved to Chemung County and instituted a proceeding in Chemung County Family Court, which resulted in an Order of May 16, 1990, granting respondent custody, this Decision being based on the Ohio Court Order.

The petitioner acknowledges she had little contact with Sarah after her removal to Chemung County, as she was terrified of respondent and feared for her safety and her two older daughters.

Petitioner received no notice of proceedings in Ohio, and had no funds to travel to New York in May of 1990 to oppose the application of respondent in Chemung county Family court. She was unable to afford legal counsel and finally received assigned counsel in Chemung County. Petitioner has a Master's Degree in counselling and has had employment in her field in the State of Florida, but has experienced financial difficulties. She had infrequent contact with Sarah since 1990 by phone and mail. Petitioner acknowledges using cocaine on a number of occasions and contents respondent was a drug user.

Respondent acknowledges he did not inform Ohio Court of the modification agreement, and denies threatening to kill petitioner, but admits attempting suicide.

Kathleen Bennett, wife of respondent, has lived with Sarah and respondent since January of 1990, and has two older chil-

dren who reside in the Bennett household. This is her third marriage.

Home study reports for both parties have been received and reviewed by the Court.

CONCLUSIONS OF LAW

The Court at the conclusion of the fact-finding hearing determined that petitioner had not abandoned Sarah, but must conclude that she made little concerted effort to develop meaningful contact with her daughter since 1990. The Court does reject her position that fear and finances prevented on-going contact, these may have been of some significance, but given respondent's education, training and employment with Florida Department of Health and Rehabilitative services as child abuse investigator, the Court is of the opinion that petitioner could have been more attentive to furthering her relationship with Sarah.

The Ohio Court was not provided with the full facts and details concerning the subsequent modification agreement between the parties filed February 9,1987, and this error was compounded by the Chemung County Family Court's decision of May 16th, 1990. However, the child has received proper care and attention in the home of respondent and his present wife, and appears to be developing satisfactorily. Sarah advised the Law Guardian that she wishes to have contact with her natural mother and this should be encouraged and nurtured, although Sarah's best interests at his time will be served by continuing custody with the respondent. (Eschbach v. Eschbach, 56 NY 2d 167, 171), The Court of Appeals has decreed that a change in custody compels consideration of all relevant circumstances and a determination as to whether, in the totality of the circumstances, such a change would be in the best interests of the child (Friederwitzer s. Friederwitzer, 55 NT 2d 89, at 95-96).

Consideration must be given to "maintaining stability in the child's life, relative fitness of the parents, quality of home life and competence of parental guidance". McCauliffe v. Pence, 176 AD 2d 809, 34 NY 2d 887).

Notwithstanding the questionable circumstances surrounding the obtaining of custody in the Ohio Court, the stability of Sarah's young life should not be jeopardized by a change in custody and removal from New York to Florida. Sarah's physical, emotional and educational development appear to be proceeding in a positive direction, and any disruption at this time would be detrimental to her best interests. However, extensive and liberal visitation with the mother should be encouraged in Chemung County for the present, with a view to visitation in Florida by next summer for a suggested period of two to three weeks.

ORDERS: Legal and physical custody remains with Timothy Bennett with liberal visitation to the petitioner, including phone calls and correspondence.

Dated: October 8, 1993.

ENTER: /s/
Samuel J. Castellino
Family Court Judge

DISTRIBUTION:
File
Attorney Andrew Rothstein (2) one for his client
Attorney Steve Maio (2) one for his client
Attorney Diana Hughes (1) law guardian

NOTICE OF ENTRY
PLEASE BE ADVISED THAT THIS DOCUMENT WAS ENTERED IN THE CHEMUNG COUNTY FAMILY COURT CLERK'S OFFICE ON THE 8TH DAY OF OCTOBER 1993.

/s/

MARIE A. BREWER
CLERK

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FIFTH DISTRICT

5DCA CASE NO. 94-02411
FLAGLER
L.T. CASE NO. 94-527-CA

IN RE: THE MARRIAGE OF
DEBRA LOUISE NEUMAN,
Appellant,
vs.
TIMOTHY ALAN BENNETT,
Appellee.
_____/

INITIAL BRIEF OF APPELLANT

Appeal from the Circuit Court
In and for Flagler County, Florida

RICHARD J. D'AMICO, ESQUIRE
Attorney for Appellant
533 N. Nova Rd., Suite 112
Ormond Beach, FL 32174
(904) 677-8499
Florida Bar No. 360317

TABLE OF CONTENTS

TABLE OF CONTENTS A-21

CITATION OF AUTHORITIES A-23,A-24

STATEMENT OF CASE AND FACTS ..... A-25—A-27

SUMMARY OF THE ARGUMENT A-28

ISSUES PRESENTED FOR REVIEW:

POINT 1.
PURSUANT TO THE JUDGMENT OF DISSOLUTION BETWEEN THE PARTIES WAS ENTERED IN THE STATE OF FLORIDA. THE CIRCUIT COURT THEREFORE ERRED IN REFUSING TO ACCEPT JURISDICTION OVER A PROCEEDING TO MODIFY THAT JUDGMENT. ..... A-29—A-32

POINT 2.
THE ACCEPTANCE OF JURISDICTION OVER THE CHILD BY THE COURTS OF THE STATE OF NEW YORK VIOLATED THE PKPA. THE CIRCUIT COURT OF THIS STATE THEN ERRED IN DEFERRING JURISDICTION TO THE STATE OF NEW YORK WHEN THAT STATE WAS WITHOUT
JURISDICTION. ..... A-33—A-36

POINT 3.
WHETHER APPELLANT APPEARED IN THE NEW YORK ACTION OR NOT IS IRRELEVANT AS SUBJECT MATTER JURISDICTION CAN NEVER BE WAIVED BY ANY COURT. ..... A-37—A-38

CONCLUSION A-39

CERTIFICATE OF SERVICE A-40

CITATION OF AUTHORITIES

Bodenheimer, 14 Fam.L.Q. 203, 1981 ..... A-30—A-31

Booker v. Booker, 636 So.2d 796
(lst DCA, 1994) ..... A-31—A-32

Brautigam v. MacVicar, 73 So.2d 863, 866
(Fla.1954) A-37

Brooks v. Brooks. 546 So.2d 100 (4th DCA, 1989) A-37

Cates v. Heffernan, 154 Fla. 422, 431, 18 So.2d 11, 16
(1944) A-37

Enslein v. Enslein, 112 A.D.2d 973, 492 N.Y.S.2d 785
(1985) A-34, A-35

Gomez v. Gomez, 86 A.D.2d 594,446 N.Y.S.2d 127 ... A-38

Greenfield v; Greenfield, 599 So.2d 1029
(4th DCA, 1992) A-32

Hernandez v. Hernandez, 406 So.2d 513
(3rd DCA, 1981) A-32

Howard v. Howard, 378 So.2d 1329
(5th DCA, 1980) A-32

Lamon v. Rewis, 592 So.2d 1223 (lst DCA, 1992) A-31

Lipsitt v. Lipsitt, 608 So.2d 547 (4th DCA, 1992) A-32

Michalik v. Michalik, 494 N.W. So.2d 391 (Wis. 1993) A-36

Quinones v. Quinones, 569 So.2d 885 (3rd DCA, 1990) A-32

Sams v. Boston, 384 S.E.2d 151 (W.Va. 1989) A-36

Shores v. Shores, 670 F.Supp. (E.D. Tennessee, 1987) A-36

State ex rel. Caraker v. Amidon, 68 So.2d 403, 405 (Fla. 1953) A-37

Steward v. Steward, 588 So2d 692 (5th DCA, 1991) ... A-31

Thompson v. Thompson, 484 U.S. 174, 108 S.Ct 513 98 L.Ed.2d 512 (1987) A-33,A-34,A-35

Walt v. Walt, 574 So.2d 205 (1st DCA (1991) A-32

Williams v. Starnes, 522 So.2d 469, 471 (Fla.2d DCA 1988) A-37,A-38

Winn & Lovett Grocery Co. v. Luke, 156 Fla. 638, 641, 24 So.2d 310, 312 (1945) ..... A-29—A-35

Yurgel v. Yurgel, 572 So.2d 1327 (Fla. 1990) . A-29—A-31

STATUTES

Fla. Statutes 61.1301 ..... A-29—A-31

28 U.S.C.A 1738A(1987) A-30,A-33,A-35

STATEMENT OF CASE AND FACTS

The marriage between the parties was dissolved by Judgment of the Circuit Court, Duval County, on October 14, 1985. Pursuant to that Judgment, the parties were awarded shared parental responsibility to the child of the marriage, SARAH ANNE BENNETT, with former husband designated as the primary residential parent. However, the child had been and continued to reside with Appellant (R17,18). Thereafter, the parties entered into a Stipulation of Settlement modifying the primary residential parent from that of Former Husband to that of Appellant. This stipulation was executed by Appellee on January 21, 1989 and was filed in the Circuit Court, Duval County, on February 9, 1987 (R-11,12).

After the modification stipulation was filed in Duval County, Former Husband engaged in acts of domestic violence, stalking, and verbal and psychological abuse of Appellant (R-18). In order to protect the child, in November of 1989 Appellant sent the child to live temporarily to live with Appellant's sister in Ohio. In and about January of 1990, Former Husband learned of the fact that the child was residing with the Appellant's sister in Ohio and commenced a proceeding in the State of Ohio to establish physical custody to the child. He appeared at a hearing in Warren County, Ohio, stating that he was the custodial parent of the child and entitled to immediate custody of the child. During the course of that proceeding, he neglected to inform the Court of the fact the parties had previously entered into a Modification Agreement in Florida and that the child had been in the custody of Appellant since the Modification Agreement had been signed. On the basis of the statements made by Former Husband and the omissions of Former Husband, the Ohio Court granted custody to Former Husband (R-18, 19).

After the hearing in Ohio, Former Husband immediately removed the child from the State of Ohio and transported her

to his residence in Elmira, New York. Former Husband then applied to the Court in the State of New York and obtained a temporary custody order which was served upon Appellant in the State of Florida shortly before the scheduled hearing in the State of New York. Appellant was unable to attend the hearing upon such short notice. The child has remained in the custody of Former Husband since January of 1990.

In 1993, Former Husband commenced an action in the State of New York to have the child adopted by his present wife, an action which, if successful, would result in a termination of Appellant's parental rights. Appellant filed a counterpetition to enforce her Florida custody order and also objected to the subject matter jurisdiction of the Court. After a trial, the Family Court of the State of New York entered an Order granting Former Husband custody of the child subject to limited visitation rights with Appellant. Appellant's first visitation in Florida with the child took place in August of 1994.

During the August 1994 visit, Appellant observed that the child was suffering from substantial physical, educational, and psychological difficulties. She alleged the following difficulties in her Petition:

a. The child appeared much smaller than she should have been at her age and appeared unhealthy and malnourished.

b. The child's educational level was such that she was at the second grade level while actually in the fourth grade.

c. She had been subjected to psychological abuse by her father who attempted to alienate the child from her mother.

d. The child was very fearful of her father stating that she had been beaten by her father and was afraid to return to New York.

On the basis of Appellant's observations and the statements of the child, Appellant commenced a Modification proceeding in the Circuit Court, Flagler County, her present County of residence. Former Husband moved to dismiss the Petition. At the hearing held before the Circuit Judge, no evidence was taken. Rather, the Court heard oral argument of the attorneys and reviewed the Order entered in the State of New York. After that hearing, the Court granted the motion to dismiss and concluded that the Court did not have subject matter jurisdiction. This is an appeal from that Order.

SUMMARY OF THE ARGUMENT

Appellant's primary argument is that since this is a proceeding for modification of a Florida Judgment of Dissolution of Marriage, the State of Florida has jurisdiction pursuant to the appropriate provisions of the Uniform Child Custody Jurisdiction Act (UCCJA). Under that act the State of Florida retains jurisdiction over children of a marriage until virtually all contacts with the State of Florida have been lost. Since Former Wife has resided within the State of Florida since the date of the dissolution to the present date, Florida has never lost jurisdiction and is the appropriate forum for all post judgment proceedings.

The State of New York erred in accepting jurisdiction over any post judgment proceedings in this matter as Florida had continuing jurisdiction over the matter. A Florida Court may make a determination as to whether the Courts of another state entered an order without jurisdiction thus rendering the foreign order void.

Under the Parental Kidnapping Prevention Act (PKPA) the State of Florida retains jurisdiction over a custody proceeding until all contestants leave the state. Since the PKPA provisions supercede the UCCJA, Florida has exclusive jurisdiction over all post judgment custody matters.

Appellant contends that all orders entered by the State of New York are void as New York never had subject matter jurisdiction over this matter. Furthermore, irrespective of any New York orders, the State of Florida has exclusive jurisdiction over any proceeding to modify a validly obtained Florida judgment of dissolution of marriage.

ARGUMENT

POINT I

THE JUDGMENT OF DISSOLUTION OF MARRIAGE BETWEEN THE PARTIES WAS ENTERED IN THE STATE OF FLORIDA. THE CIRCUIT COURT THEREFORE ERRED IN REFUSING TO ACCEPT JURISDICTION OVER A PROCEEDING TO MODIFY THAT JUDGMENT.

This is an appeal from the dismissal of a Petition for Modification of the custody provisions of a Florida Judgment of Dissolution of Marriage. The jurisdictional requisites are set forth in the Uniform Child Custody Jurisdiction Act (UCCJA) (F.S. 61.1301 et seq.). Specifically, section 61.133 deals with modification of custody decrees and states as follows:

> "(1) If a Court of another state has made a custody decree, a Court of this State shall not modify that decree unless: (a) it appears to the Court of this state that the Court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify this decree and (b) the Court of this state has jurisdiction."

Supreme Court has expressly interpreted this provision and has determined that jurisdiction for modification proceedings of Florida judgments remains with the State of Florida until virtually all contacts with the State have been lost. In Yurgel v.

Yurgel, 572 So.2d 1327 (Fla.1990) the Court stated at page 1331 as follows:

> "Nevertheless, we cannot agree with the District Court's assumption that section 61.1308 somehow operates to 'automatically' terminate jurisdiction already validly acquired merely because the child has resided outside the state for more than six (6) months when the child clearly has maintained significant contacts with Florida. To the contrary, jurisdiction must be presumed to continue once it is validly acquired under section 61.1308; and it continues up until a Florida Court expressly determines on some other basis that jurisdiction is no longer appropriate, until virtually all contacts with Florida have ceased, until some other Florida Statute terminates jurisdiction, or until jurisdiction is terminated by operation of the PKPA (see 28 U.S.C 1738a (1987)."

And at page 1332 as follows:

> "A custody proceeding properly begun in Florida remains Florida's jurisdiction until Florida determines otherwise, unless virtually all contacts with the state clearly have been lost."

The Supreme Court at page 1331 of Yurgel quoted extensively from Law Review Articles of Professor Brigitte Bodenheimer and emphasized the following language from Bodenheimer, 14 Fam. L.Q. 203, 1981 at page 214 as follows:

> "In other words the continuing jurisdiction of the prior Court is exclusive. Other states do not have jurisdiction to modify the decree.

> They must respect and defer to the prior state's continuing jurisdiction."

In the instant case, Former Husband relocated to the State of New York. Former Wife and the child remained within the State of Florida. After Former Wife had sent the child to reside temporarily with her sister in the State of Ohio, Former Husband removed the child from the State of Ohio and then to the State of New York. At present, Former Husband and the child reside in New York and Former Wife resides within the State of Florida. Therefore, based upon the criteria set forth in Yurgel, contacts with the State of Florida have not been lost as Former Wife resides within the state and has resided continuously within the state since the judgment of dissolution of marriage was entered by the Circuit Court of Duval County.

Post Yurgel cases emanating from the various District Courts of Appeal have reinforced the fact that the State of Florida retains jurisdiction in modification proceedings. The same conclusion was reached in Steward v. Steward, 588 So.2d 692 (5th DCA 1991) at page 693 as follows:

> "Under the UCCJA, the rules governing modification jurisdiction are markedly different from those applicable to initial jurisdiction. Initial jurisdiction is primarily governed by Section 61.1308, Florida Statutes, while Section 61.133 forbids a Florida Court from modifying the custody decree of another state unless the other state no longer has, or has declined to exercise jurisdiction."

In that case, the Court determined that Florida did not have jurisdiction because the initial proceeding had been brought in the State of Mississippi and Mississippi continued to retain jurisdiction under its decree. In accord are Lamon v. Rewis, 592 So.2d 1223 (lst DCA 1992), Booker v. Booker, 636 So.2d 796

(lst DCA 1994), Lipsitt v. Lipsitt, 608 So.2d 547 (4th DCA, 1992), and Greenfield v. Greenfield, 599 So.2d 1029 (4th DCA, 1992), quoting from Yurgel v. Yurgel, supra.

Based upon application of the cited sections of the UCCJA, the Courts of the State of New York never had jurisdiction at any time in any of the proceedings that were held in that State. A Florida Court must give full faith and credit to the custody decree of a foreign state only when the Florida Court first determines that the foreign state had jurisdiction of the custody issue pursuant to the UCCJA. Hernandez v. Hernandez 406 So.2d 513 (3rd DCA 1981), Walt v. Walt, 574 So.2d 205 (lst DCA, 1991), Howard v. Howard, 378 So.2d 1329 (5th DCA, 1980). In Howard, a Florida Court entered a decree which was contrary to a Kentucky decree because the Florida Court determined that the Kentucky Court lacked jurisdiction to enter the original decree. Based upon these authorities, any orders entered by the State of New York were entered without subject matter jurisdiction and are therefore null and void. Quinones v. Quinones, 569 So.2d 885 (3rd DCA, 1990) addressed the issue of conflicting Custody decree of two different states. The Court found that jurisdiction under the UCCJA had not been validly obtained. At page 885 the Court stated:

> "Without jurisdiction over the subject matter, the judgment was void."

The State of Florida retains jurisdiction over this matter pursuant to the initial judgment of dissolution of marriage entered by the Circuit Court, Duval County. Accordingly, the Order of the Circuit Court dismissing the Appellant's modification proceeding is erroneous and should be reversed.

POINT TWO

THE ACCEPTANCE OF JURISDICTION OVER THE CHILD BY THE COURTS OF THE STATE OF NEW YORK VIOLATED THE PKPA. THE CIRCUIT COURT OF THIS STATE THEN ERRED IN DEFERRING JURISDICTION TO THE STATE OF NEW YORK WHEN THAT STATE WAS WITHOUT JURISDICTION.

The PKPA is set forth at 28 U.S.C.A 1738A. The relevant provisions of that section are as follows:

> "(d) The jurisdiction of a Court of a state which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(l) of this section continues to be met and such state remains the residence of the child or of any contestant." and
>
> "(c)(l) A child custody determination made by a Court of a state is consistent with the provisions of this section only if -
>
> (1) such Court has jurisdiction under the laws of such state;"

Analysis of these sections leads to the inescapable conclusion that once a Court has made a determination in a custody dispute it shall retain jurisdiction unless all contestants no longer reside in that state. In the instant case, since Appellant has continuously resided in the State of Florida since the judgment of dissolution of marriage, the State has not lost jurisdiction over the child pursuant to the PKPA.

The United States Supreme Court has addressed the PKPA in Thompson v. Thompson, 484 U.S. 174, 108 S.Ct 513, 98

L.Ed.2d 512 (1987). While the Thompson case primarily addressed the issue of whether a federal Court would have jurisdiction in an interstate custody jurisdictional dispute, the Court reviewed the Act and the purposes for the enactment of the statute. Primarily, the Court determined that the act requires each state to afford full faith and credit to any state which renders an initial custody decree. At page 177, the Court stated as follows:

> "Once a state exercises jurisdiction consistently with the provisions of the act, no other state may exercise concurrent jurisdiction over the custody dispute, Section 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, as all states must accord full faith and credit to the first state's ensuing custody decree."

The PKPA has been interpreted by both the State of New York in Enslein v. Enslein, 112 A.D 2d 973, 492 N.Y.S.2d 785 (1985) and the State of Florida in Yurgel v. Yurgel, supra. Enslein involved an interstate custody dispute between the states of New York and Florida. The parties had resided in the State of New York but then relocated to the State of Florida. They executed a Settlement Agreement in Florida and a Judgment of Divorce was entered by the State of Florida. After the divorce, the father commenced a modification proceeding in Florida to transfer custody of the child to him. Thereafter, the former wife commenced a custody proceeding in the State of New York to modify the custody provisions of the Florida Judgment. The New York Appellate Division concluded that the PKPA preempts the UCCJA in custody matters. At 492 N.Y.S.2d page 787, the Court stated:

> "Appellant is correct in stating that with regard to the factors necessary before jurisdiction can be determined in interstate custody

> matters, the Federal Kidnapping Prevention Act of 1980 (PKPA) (28 U.S.C. Section 1738A) pre-empts the UCCJA (28 U.S.C. Section 1738A)(a)...

While New York may validly claim jurisdiction as the 'home state' of the child (28 U.S.C. Section 1738A(c)(2)(A)) it may not modify the Florida judgment unless Florida no longer has jurisdiction or declines to exercise it (28 U.S.C. Section 1738A (f))."

Thus, the Court concluded that even though New York was the home state of the child, a New York Court still could not modify the Florida judgment unless Florida no longer had jurisdiction or declined to exercise it under the PKPA.

The Supreme Court of Florida in Yurgel, supra, arrived at the same conclusion as the Appellate Division in Enslein. Construing the PKPA at page 1329, the Court stated:

> "Under the Supremacy Clause of the Constitution, the PKPA supersedes any and all inconsistent state laws. Thompson v. Thompson, 484 U.S. 174, 108 S.ct 513, 98 L.ed2d 512 (1988)."

Based upon these authorities, it appears clear that both the State of New York and the State of Florida recognize that the PKPA is determinative of custody jurisdiction in any interstate custody dispute.

In the instant case, while New York may well have been the "home state" of the child at the time of the New York modification proceeding, pursuant to the PKPA, the State of New York never acquired jurisdiction over the child because under the PKPA a modification proceeding must be brought in the state in which the initial decree was entered provided that at least one contestant remains in that state. In this case, Appellant has continuously lived in the State of Florida.

The Supreme Court of Wisconsin has also construed the PKPA, specifically the provisions regarding modification. In Michalik v. Michalik 494 N.W. So.2d 391 (Wis. 1993), the Court concluded that the state to which one party had moved lacked jurisdiction to modify the custody decree rendered by another state. That case contains an excellent review of the history and purpose of the PKPA as it relates to the UCCJA. Specifically stating that the PKPA was enacted to remedy the weaknesses of the UCCJA, the Court opined at page 398 as follows:

> "However, as explained above, the PKPA shows a preference for continuing jurisdiction in the original 'home state'. Jurisdiction (under the PKPA) does not 'shift' unless both parties leave the state that first correctly exercised jurisdiction - so long as the state's general domestic relations law provides for continuing jurisdiction."

In accord see Shores v. Shores 670 F.Supp. (E.D. Tennessee, 1987), Sams v. Boston, 384 S.E.2d 151 (W.Va. 1989), Supreme Court of West Virginia.

POINT THREE

WHETHER APPELLANT APPEARED IN THE NEW YORK ACTION OR NOT IS IRRELEVANT AS SUBJECT MATTER JURISDICTION CAN NEVER BE WAIVED BY ANY COURT.

In Brooks v. Brooks, 546 So.2d 100 (4th DCA, 1989) the Court determined that the appearance by one party in a proceeding in another state was irrelevant to the issue of whether a Florida Court had jurisdiction under the UCCJA. The Court, in Brooks, stated as follows at page 101:

> "Whether a parent has submitted himself to the jurisdiction of the Court is irrelevant to the proper determination of which state should assume jurisdiction in a custody dispute."

Under both New York and Florida law, a party cannot confer subject matter jurisdiction by agreement if there is no legal basis for jurisdiction. Brautigam v. MacVicar, 73 So.2d 863, 866 (Fla.1954) ("Judicial power or jurisdiction cannot be conferred or given to the Court by mutual consent or stipulation."); State ex rel. Caraker v. Amidon 68 So.2d 403, 405 (Fla.1953) ("Jurisdiction is conferred upon a court by the Constitution or a statute and not by agreement between the parties."); Winn & Lovett Grocery Co. v. Luke, 156 Fla. 638, 641, 24 So.2d 310, 312 (1945) ("jurisdiction of the subject matter cannot be conferred by consent or failure to object"); Cates v. Heffernan, 154 Fla. 422, 431, 18 So.2d 11, 16 (1944) ("it is well settled that the parties to a cause cannot by consent confer upon a court jurisdiction of the subject matter");

Williams v. Starnes, 522 So.2d 469, 471 (Fla. 2d DCA 1988) (in a custody dispute, "subject matter jurisdiction cannot be

waived or conferred upon a court by consent or agreement of the parties"); accord Gomez v. Gomez, 86 A.D.2d 594, 446 N.Y.S.2d 127.

Thus, the Courts of the state of New York could not assume continuing jurisdiction over this matter even if Appellant had been involved in a proceeding in that state. Rather, the strict requirements of the UCCJA and PKPA should have been followed by the Courts of the State of New York. In view of the failure of the Courts of the State of New York to follow the jurisdictional rules, all orders entered by that Court are null and void and of no force and effect.

CONCLUSION

Since the parties to this action were divorced in the State of Florida, the State of Florida retains jurisdiction over any custody matters regarding the child both pursuant to the UCCJA and the PKPA. All orders entered by the Courts of the State of New York purporting to modify the Florida judgment are void for lack of subject matter jurisdiction. In September of 1994, when Former Wife filed a Petition to Modify the Custody provisions of the Final Judgment of Dissolution of Marriage, the Circuit Court of the State of Florida had subject matter jurisdiction over the modification proceeding. Therefore, the Circuit Court improperly dismissed Appellant's modification proceeding. The order of the Circuit Court should be reversed and the matter remanded for trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to BRUCE BARNARD, ESQUIRE, P.O. Box 3956, St. Augustine, Florida 32085-3956, this 31st day of January, 1995.

/s/_____
RICHARD D'AMICO, ESQUIRE
Attorney for Appellant
533 N. Nova Rd., Suite 112
Ormond Beach, FL 32174
(904) 677-8499
Florida Bar No. 360317

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FIFTH DISTRICT

5DCA CASE NO. 94-02411
FLAGLER
L.T. CASE NO. 94-527-CA

IN RE: THE MARRIAGE OF
DEBRA LOUISE NEUMAN,
Appellant,
vs.
TIMOTHY ALAN BENNETT,
Appellee.
_____/

REPLY BRIEF OF APPELLANT

Appeal from the Circuit Court
In and for Flagler County, Florida

RICHARD J. D'AMICO, ESQUIRE
Attorney for Appellant
533 N. Nova Rd., Suite 112
Ormond Beach, FL 32174
(904) 677-8499
Florida Bar No. 360317

TABLE OF CONTENTS

TABLE OF CONTENTS A-42

CITATION OF AUTHORITIES A-43

ARGUMENT A-44, A-45

CERTIFICATE OF SERVICE A-46

CITATION OF AUTHORITIES

Booker v. Booker, 636 So.2d 796 (1st DCA, 1994) A-45

Thompson v. Thompson, 484 U.S. 174, 108 S.Ct 513
98 L.Ed.2d 512 (1987) A-44

Yurgel v. Yurgel, 572 So.2d 1327 (Fla. 1990) A-44

STATUTES

Fla. Statutes 61.133 ..... A-44

28 U.S.C.A. 1738A(1987) A-44

ARGUMENT

The PKPA controls over the UCCJA under the Supremacy Clause of the Constitution.

Appellee's primary argument is that Appellant lost jurisdiction because she was unable to exercise visitation with the child for a period of three (3) years. However, Appellant resided continuously within the State of Florida from the date of the entry of the Final Judgment to the present date. The PKPA provides that once a judgment is entered jurisdiction that judgment is modifiable only by the same Court that issued the judgment so long as one of the parties and/or the child still reside within that jurisdiction. (28 U.S.C. 1738A(d)) This may conflict with the provisions of the UCCJA which is not specific as to the contacts that may give rise to loss of jurisdiction (F.S. 61.133).

Based upon Yurgel v. Yurgel 572 So.2d 1327 (Fla.1990) and Thompson v. Thompson, 484 U.S. 174, 108 S.Ct 513 98 L.Ed.2d 512 (1987) both the Florida Supreme Court and the United States Supreme Court have determined that the PKPA controls over the UCCJA. Therefore, since Former Wife continuously resided within the State of Florida, Florida has subject matter jurisdiction over this controversy.

Appellant's argument is essentially that subdivision (d) of the PKPA creates a uniform rule that prohibits changing of jurisdiction so long as one of the parties remains within the original state. The only other requirement of the PKPA is set forth in subdivision (c)(l) which states as follows:

> "(c) a child custody determination made by a Court of a state is consistent with the provisions of this section only if-(l) such Court has jurisdiction under the law of such state;"

Obviously a Court of the State of Florida has jurisdiction under the law of this state as the Circuit Court of Duval County

specifically reserved jurisdiction in its judgment. Thus, the requirements of the PKPA have been met. Appellee's argument that such a theory would render subdivisions (c)(2)(a) and (c)(2)(c) meaningless is not a correct interpretation of the law. In the event that a situation were to arise wherein neither the parties nor any contestant resided in the state which made the initial decree, then subdivision (c) would apply. Subdivision (d) however, is controlling so long as the child or any contestant resides within the state.

In the event that this Court determines that the UCCJA controls, then, under Booker v. Booker, 636 So.2d 796 (lst DCA 1994) Former Wife was entitled to an evidentiary hearing on the issue of the significant contacts. In Booker, the Court stated at page 800:

> "A trial Court's ruling on a suggestion of inconvenient form is discretionary, but a Court that dismisses an action on that ground abuses its discretion 'where there is no record evidence supportive of the Court's factual findings."

At the hearing the Court determined that it did not have sufficient time to conduct an evidentiary hearing. At page 23 of the transcript, line 9-11 the Court stated as follows:

> "THE COURT: Well, we are getting into some factual issues that I don't have the time to address this morning."

Since Appellant was never afforded a full evidentiary hearing, in the event the Court determines that her contacts with the child are an issue, then the matter should be remanded for a full evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to BRUCE BARNARD, ESQUIRE, P.O. Box 3956, St. Augustine, Florida 32085-3956, this 14th day of March, 1995.

/s/_____
RICHARD D'AMICO, ESQUIRE
Attorney for Appellant
533 N. Nova Rd., Suite 112
Ormond Beach, FL 32174
(904) 677-8499
Florida Bar No. 360317